

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35906

MARVELL CLEM KAYKAY,)	2010 Unpublished Opinion No. 399
)	
Petitioner-Appellant,)	Filed: March 24, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order denying petition for post-conviction relief, affirmed.

Marvell C. Kaykay, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Marvell Clem Kaykay appeals pro se from the denial of his petition for post-conviction relief following an evidentiary hearing. For the reasons set forth below, we affirm.

I.

BACKGROUND

In the underlying criminal case, Kaykay was convicted of delivery of methamphetamine in violation of Idaho Code § 37-2732(a). The evidence at trial indicated that an undercover police officer and a confidential informant met Kaykay and drove him to a water treatment plant near the Boise greenbelt where Kaykay met with Andrew Morrison to obtain methamphetamine. Kaykay and Morrison walked over to a bathroom, and Morrison handed Kaykay a small baggie. Kaykay brought the baggie back to the car and gave it to the undercover officer in exchange for \$250. Kaykay gave \$230 to Morrison for the methamphetamine, and kept the other \$20 as payment for himself. The substance in the baggie tested positive for methamphetamine.

At trial, the state presented a videotape of the drug transaction. The jury found Kaykay guilty and the district court imposed a unified sentence of ten years, with four years determinate. Kaykay appealed and this Court affirmed his judgment of conviction and sentence in an unpublished opinion, *Kaykay v. State*, Docket No. 34083 (Ct. App. April 28, 2008) (unpublished).

Kaykay filed a pro se petition for post-conviction relief. In his petition, Kaykay sought relief on several grounds, including claims of ineffective assistance of trial counsel. The district court issued a notice of intent to dismiss all of Kaykay's claims except those pertaining to ineffective assistance of counsel. The district court set an evidentiary hearing, gave Kaykay thirty days to respond to the notice of intent to dismiss, and indicated it would appoint counsel if requested. Kaykay filed a timely response to the notice of intent to dismiss and requested counsel. However, his response simply restated his claims and raised an additional claim of ineffective assistance of appellate counsel. The district court dismissed Kaykay's claims that did not pertain to ineffective assistance of counsel and granted his request for post-conviction counsel. At the evidentiary hearing, Kaykay withdrew his claim of ineffective assistance of appellate counsel, and Kaykay's trial counsel was the only witness who testified. After the hearing, the district court issued an order denying Kaykay's petition for post-conviction relief. Kaykay now appeals.

II.

STANDARD OF REVIEW

An applicant for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which the claim is based. Idaho Criminal Rule 57(c); *Estes v. State*, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969). Where there is competent and substantial evidence to support findings made after an evidentiary hearing on an application for post-conviction relief, those findings will not be disturbed on appeal. *Holmes v. State*, 104 Idaho 312, 313, 658 P.2d 983, 984 (Ct. App. 1983). The credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence are all matters within the province of the trial court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). On review of an order denying post-conviction relief, the lower court's decision that the burden of proof has not been met is entitled to great weight, and a finding that a party has failed to prove his claim will not be set aside

unless that finding is clearly erroneous. *Sanders v. State*, 117 Idaho 939, 792 P.2d 964 (Ct. App. 1990); *Larkin*, 115 Idaho at 74, 764 P.2d at 441.

III. DISCUSSION

Kaykay asserts that the district court erred when it denied his petition for post-conviction relief after an evidentiary hearing. Specifically, he challenges the court's denial of his claims that his trial counsel failed to re-submit motions filed by Kaykay prior to counsel being appointed on his behalf, failed to point out evidence at trial as Kaykay wished, and failed to file a motion for the confidential informant to be called at the jury trial.¹ A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Kaykay argues that his trial counsel was ineffective because he failed to re-submit Kaykay's pro se motions. However, Kaykay's trial counsel testified at the evidentiary hearing that he reviewed Kaykay's motions and opted not to refile them as part of an overall strategy and to avoid potential violations of professional and ethical rules for filing frivolous motions. With

¹ It appears that Kaykay also asserts in his appellate brief that his appellate counsel failed to raise certain issues on appeal. However, Kaykay withdrew his claim of ineffective assistance of appellate counsel at the evidentiary hearing. As such, the district court did not address this claim and neither will we.

regard to deciding not to file a motion to suppress the videotape of the drug transaction, Kaykay's trial counsel stated:

Well, the tape was very damaging, and, in fact, I think it was pretty much the whole ball game for the entire case. I would have liked to have been able to suppress that tape, but I could not conceive of any reason why I could legally do that, so I did not file any motions to suppress that tape.

Kaykay also argues that there should have been a motion to discover the identity of the confidential informant. However, as the district court noted, Kaykay's trial counsel testified and the record shows that this decision was not unprofessional or prejudicial. Indeed, Kaykay was already aware of the confidential informant's identity as he provided his counsel with a sheet of information on the informant before trial. Moreover, Kaykay's trial counsel's decisions not to call the informant as a witness or introduce particular evidence were strategic. Kaykay's trial counsel testified that the decisions he made were in the best interests of his client at the time since the confidential informant was employed by the state and likely would have testified exactly as to what was on the videotape of the drug transaction.

Lastly, Kaykay argues that his trial counsel failed to introduce evidence that would have impeached the testimony of the undercover officer. Kaykay argues that the fact that there was no purchase money in evidence was vital to his case and damaging to the officer's testimony. However, Kaykay's trial counsel testified that this was not a focal point of this case and it could have been explained away by the officer and supported by the video where the jury could see the money being counted out. Instead of making money the focal point of the case, he made the hand off of the drugs the focal point. In doing so, Kaykay's trial counsel challenged the officer's testimony about the location of the transaction by bringing in evidence that there was a tree that blocked the officer's direct line of sight. As the district court noted, the jury was made aware of this fact, weighed it, but still found Kaykay guilty. Kaykay also argues that the officer's testimony regarding whether Kaykay and Morrison went into the bathroom should have been impeached as Kaykay maintains that he entered the bathroom to speak to Morrison and the officer testified to the contrary.² Once again, trial counsel stressed that the focal point of the case

² The district court also points out that in addition to the strategic reasons for not pursuing this evidence, Kaykay's trial counsel noted that Morrison's testimony, in the form of an affidavit, would not have been admissible. The court stated:

was the hand off of the drugs, not whether Kaykay and Morrison were in the bathroom together. As noted above, Kaykay's trial counsel introduced evidence that a tree blocked the officer's line of sight, and this evidence was weighed by the jury. Kaykay finally argues that his trial counsel should have pursued the theory that he and Morrison exchanged a cigarette and not drugs. However, his trial counsel testified, and we agree, that introducing a theory where Kaykay drove thirty minutes across town for a cigarette would have been a very unwise one to pursue at trial.

Kaykay has failed to establish that his trial counsel's performance was deficient. We agree with the district court when it stated:

Petitioner is correct that there was more evidence that might have been introduced to the jury, such as the confidential informant's history, the lack of buy-money, the exchange of a cigarette, and whether the Defendants had entered the bathroom. However, Petitioner fails to recognize the additional damage that such evidence may have caused to his case.

Kaykay's trial counsel recognized that it would not have been wise to pursue meritless motions and introduce irrelevant evidence because it would not have been helpful and could have had a detrimental effect on Kaykay's case. By not pursuing certain defenses, Kaykay's trial counsel kept other harmful testimony and theories from the jury. These were strategic decisions to help Kaykay's case. Even assuming Kaykay were able to establish that his trial counsel's performance was deficient, he did not meet his burden of establishing prejudice as he did not even attempt to argue prejudice at the evidentiary hearing or on appeal.

IV.

CONCLUSION

The district court did not err when it denied Kaykay's petition for post-conviction relief. Kaykay has failed to show that his trial counsel's performance was deficient or that he was prejudiced. Accordingly, we affirm.

Chief Judge LANSING and Judge MELANSON **CONCUR.**

As to the affidavit, [Kaykay's trial counsel] notes that it would have been inadmissible hearsay, because the State would have been unable to cross-examine the declarant as to the statements in the affidavit. [Trial counsel] correctly knew he would be unable to call the Co-Defendant to testify due to the witnesses Fifth Amendment rights against self-incrimination. Therefore, he could not examine the Co-Defendant either directly or cross examine him as to the contents of his affidavit.